Cornell Law Review

Volume 27
Issue 3 *April 1942*

Article 9

Evidence Impeachment of One's One Witness Present New York Law and Proposed Changes

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EVIDENCE

IMPEACHMENT OF ONE'S ONE WITNESS: PRESENT NEW YORK LAW AND PROPOSED CHANGES

". . . . that most senseless of all evidential rules, the rule which forbids a party to impeach his own witness."†

Often in the course of a trial it becomes important for a party to impeach the testimony of a hostile or adverse witness. If the witness is one of his own "calling"[1] or one whom he has "adopted,"[2] the party's attempt to negative such testimony is prevented by the rule that one cannot impeach his own witness. Generally stated, this rule prevents a litigant from attacking his own witness through evidence tending to show: (1) his witness' bad reputation for truth and veracity, (2) prior favorable statements inconsistent with the injurious testimony given on the trial, or (3) the witness' interest, bias, or corruption to establish a motive of the witness to testify against the party calling him.[3] This absolute prohibition has been roundly condemned by both lawyers and judges for the past one hundred years;[4] yet to too large a degree it continues as the law of New York.

Today a critical examination of the current New York rule is needed to determine what changes, if any, should be made in the present law. This article seeks to fill that need by answering the four main questions: (1)

†Morgan, *The Jury and the Exclusionary Rules of Evidence* (1936) 4 U. OF CHI. L. REV. 247, 257.

[1]The courts have frequently been presented with the problem of what constitutes calling a witness so as to set in operation the prohibition against impeachment. A party does not make a witness summoned under an ordinary subpoena "his own" until he attempts to elicit from the witness an answer furnishing relevant evidence. Beebe v. Tinker, 2 Root 160 (Conn. 1794); Booth v. State, 24 Ga. App. 275, 100 S. E. 723 (1919). A witness summoned under a subpoena duces tecum becomes the party's own when he answers respecting the identity or execution of the document. Fine v. Moomjian, 114 Conn. 226, 158 Atl. 241 (1932); Salt Springs Natl. Bank v. Fancher, 92 Hun 327, 36 N. Y. Supp. 742 (1895). But simply calling, swearing and introducing the witness does not set the rule against impeachment in operation. Fall Brook Coal Co. v. Hewson, 158 N. Y. 150, 52 N. E. 1095 (1899). See also 3 WIGMORE, EVIDENCE (3d ed. 1940) § 909; 6 WIGMORE, *id.* at § 1892; 2 FORD, LAW OF EVIDENCE (1935) § 134.

[2]The most familiar instance where a party is held to have "adopted" a witness is where a witness is cross-examined as to matters not brought out on the direct examination. He then becomes the witness of the party conducting the cross examination and cannot be impeached by him. Koslowski v. U. S. Steel Furniture Co., 169 App. Div. 76, 154 N. Y. Supp. 735 (4th Dep't 1915); *In re* Campbell's Will, 100 Vt. 395, 138 Atl. 725 (1927).

[3]For the scope of the rule prohibiting impeachment of one's own witness, see generally 3 WIGMORE, EVIDENCE (3d ed. 1940) §§ 900-902; 2 FORD, LAW OF EVIDENCE (1935) § 129. See also Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 UNIV. OF CHI. L. REV. 69; Holtzoff, *The New York Rule as to Impeachment by a Party of His Own Witnesses* (1924) 24 COL. L. REV. 715.

[4]New York courts have questioned the validity of the rule against impeaching one's own witness since Sanchez v. The People, 22 N. Y. 147 (1860). See also the judicial dissatisfaction with the rule expressed in Becker v. Koch, 104 N. Y. 394, 402, 10 N. E. 701 (1887); People v. De Martini, 213 N. Y. 203, 212, 107 N. E. 501 (1914). An early and especially brilliant attack on the logical inconsistencies, of the rule can be found in 4 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (Bowring's ed. 1827) 401.

How did the rule against impeaching one's own witness first arise? (2) What are the reasons behind it? (3) What has been the history of the prohibition in New York? (4) In the light of reason and history, what action should be taken? Should the rule be preserved, modified, or utterly destroyed?

ORIGIN OF THE RULE

Legal scholars do not seem to know with certainty where or why the rule that one cannot impeach his own witness began. Three possible origins of the rule are listed—each with its better known proponent.

The first school of thought—that supported by Dean Wigmore—believes the rule has its roots in the old medieval trial by compurgation.[5] In this early mode of trial a party established his plea of defense if a prescribed number of compurgators swore in proper form that they believed he spoke the truth.[6] There were no witnesses in the modern sense of the word—only "oath helpers" who were chosen from among the kinsmen and adherents of each party. Since these persons were partisans, and since the party had an unlimited range for the selection of those to "swear him off," it was inconceivable that a party should be allowed to gainsay his own chosen witnesses.[7]

A second school of thought claims that the prohibition against impeaching one's own witness arose from the decisory oath under the Roman law,[8] where the party who tendered oath became bound by the oath of his adversary.

The third and most recent school finds the origin of the rule in the transition from the inquisitorial method of trial to an adversary system. This theory, best expounded by Dean Ladd,[9] explains that it was not until the jury became judges of the evidence alone, apart from any personal knowledge of the issue, that witnesses in the modern sense appeared. Until the concept of a witness *as the witness of a party* emerged, there could be no rational basis for a rule that a party was bound by *his* witness and that he could not impeach him.[10] In this way, Dean Ladd accounts for the absence of reported cases

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[5] 3 WIGMORE, EVIDENCE (3d ed. 1940) § 897; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 598.

[6] THAYER, PRELIMINARY TREATISE (1869) 25; von Moschzisker, *The Historic Origin of Trial by Jury* (1921) 70 U. OF PA. L. REV. 1, 73, 159, at 82.

[7] For a complete discussion of the historical background of compurgation or wager of law, see Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1921); see also Ladd, *Impeachment of One's Own Witnesses—New Developments* (1936) 4 UNIV. OF CHI. L. REV. 69.

[8] While there is no exact information, it appears inferentially from CODE JUSTINIAN, 4, 20, 17; 4, 20, 19; that a party under the Roman law could not generally impeach his own witness. During that period when it became difficult or impossible for a party to prove his case, he might call on the other party to prove his claim or defense by making his statement under oath. When this was done, the so-called "decisory oath" was binding and could not be contradicted. Crago v. State, 28 Wyo. 215, 220, 202 Pac. 1099 (1921).

[9] Ladd, *Impeachment of One's Own Witnesses—New Developments* (1936) 4 UNIV. OF CHI. L. REV. 69, 70.

[10] Even as late as Bushnell's Case, 6 How. St. Tr. 999 (1670), the jurors were permitted to rely on their own information to nullify any testimony given in court. *Cf.* Rex v. Hutton, 4 Maule & S. 532 (1816).

involving the impeachment rule until the sixteenth century, and its first reported application in 1681 in *Fitzharris' Trial*[11]—a century after compurgation had dropped into disuse, and just about the time the criminal trial became an adversary proceeding.[12] Professor Morgan agrees with Dean Ladd that the rule against impeaching one's own witness fits naturally into the "emerging adversary theory of litigation . . . —any influence by way of compurgation operating indirectly and probably without deliberation."[13]

Reasons Underlying the Rule

In 1681, when the rule against impeaching one's own witness was first announced,[14] its proponents defended it on the primitive notion that a party is *morally* bound by all the statements of his witness.[15] This ethical basis was early repudiated, however, for it had always been a well-settled corollary of the impeachment rule that a party who called a witness was not thereby barred from contradicting him on material issues (from showing by other testimony that the facts were not as he testified).[16] Any moral notion regarding impeachment was inconsistent with the rule allowing contradiction; so, by 1800, judges abandoned the ethical support for the rule and cast about for a more plausible reason.

The basis shortly thereafter announced was that by putting a witness on the stand the party calling him guarantees his credibility.[17] As Professor Greenleaf stated it:

> "When a party offers a witness in proof of his cause, he thereby represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth."[18]

The mere statement of this reason betrays its narrow unreality. Should implied guarantees be allowed to bind an unwitting party who first discovers his witness' untrustworthiness after putting him on the stand? The truth of the fact is that today in the conduct of trials neither party knows, much less

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[11]8 How. St. Tr. 223, 369, 373 (1681).

[12]By the time of Colledge's Trial, 8 How. St. Tr. 549, 636 (1681), the criminal prosecution had become an adversary proceeding, and the rule prohibiting impeachment of one's own witness was well settled. Shortly thereafter, the first civil case on the subject appeared. Adams v. Arnold, 12 Mod. 375, 90 Eng. Rep. 1064 (1700). There, Holt, C.J., refused "to suffer the plaintiff to discredit a witness of his own calling, he having testified against him." For a collection of earliest American cases stating the impeachment prohibition, See Crago v. State, 28 Wyo. 215, 222, 202 Pac. 1099 (1921).

[13]Morgan, *The Jury and the Exclusionary Rules of Evidence* (1936) 4 Univ. of Chi. L. Rev. 247, 258.

[14]Fitzharris' Trial, 8 How. St. Tr. 223, 369, 373 (1681); Colledge's Trial, 8 How. St. Tr. 549, 636 (1681).

[15]3 Wigmore, Evidence (3d ed. 1940) § 897, and cases cited therein.

[16]Rice v. Oatfield, 2 Stra. 1095 (1738); Bradley v. Ricardo, 8 Bing. 58 (1831); Brown v. Bellows, 4 Pick. 187, 194 (Mass. 1826).

[17]Whitaker v. Salisbury, 15 Pick. 545 (Mass. 1834); Pollack v. Pollack, 71 N. Y. 152 (1877).

[18]Greenleaf, Evidence (1866) § 442.

guarantees, the character or trustworthiness of his witnesses.[19] Furthermore, permission is universally given to discredit one's own witness by showing the material facts to be contrary to his assertion.[20] A law which allows the party to discredit through other witnesses what his prior witness has said and at the same time speaks of a guarantee of credibility refutes itself, and its rationale is utterly devoid of reality.[21]

A third and equally false notion argued in support of the rule is that if a party is allowed to impeach his own witness he will have a "club" with which to coerce the witness to testify as the party desires, not as the truth may dictate.[22] This reason, though at first glance easy to grasp, is illegitimate in policy.

The rule prohibiting a party from impeaching his own witness never fully protected the witness,[23] for the opposing party could always attack the witness' credibility.[24] Prohibiting the offering party from doing likewise puts him at a tactical disadvantage while only partially protecting the witness. To illustrate: Under the present law if I put *X* on the stand and he tells the story I desire, I have no wish to impeach him, but my adversary has a perfect right to attack *X*'s credibility (and will if he can). If *X* surprises me and testifies to my disadvantage, I have no right to impeach him, and my opponent, having the right but no desire to disturb favorable evidence, will not object to *X*'s reputation for veracity.[25] My opponent can thus decide, by well considered impeaching attacks, which evidence the jury will hear and which it will not.[26] Should a partisan ever be accorded so prejudicial an advantage? Does not the need of protecting the witness pale into insignificance beside this injustice in the operation of the common law rule?

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[19]May, *Some Rules of Evidence* (1876) 11 AMER. LAW REV. 264.

[20]3 WIGMORE, EVIDENCE (3d ed. 1940) § 907, and cases cited therein; 2 FORD, LAW OF EVIDENCE (1935) § 132. Hunter v. Wetsall, 84 N. Y. 549 (1881); Coulter v. Amer. Merchants Union Express Co., 56 N. Y. 585 (1874).

[21]Sanchez v. The People, 22 N. Y. 147 (1860), contains an excellent critical analysis of the guarantee reasoning and its fallacies.

[22]BULLER, TRIALS AT NISI PRIUS (1767) 297; 3 WIGMORE, EVIDENCE (3d ed. 1940) § 899; People v. Minsky, 227 N. Y. 94, 124 N. E. 126 (1919).

[23]See Ladd, *Impeachment of One's Own Witnesses—New Developments* (1936) 4 UNIV. OF CHI. L. REV. 69, 82.

[24]It is well settled in New York that a party may attack the credibility of his opponent's witnesses (1) by interrogating him as to any criminal, vicious, or disgraceful act in his life, (2) by introducing contradictory statements made out of court as to matters material to the issue, where a proper foundation is laid therefor, or (3) by introducing evidence of a bad reputation for truth and veracity. People v. Webster, 139 N. Y. 73, 34 N. E. 730 (1893); Sitterly v. Gregg, 90 N. Y. 686 (1882). See generally 2 FORD, LAW OF EVIDENCE (1935) § 146 ff.

[25]Judge May, writing in 1876, forcefully exposed the fallacy of the coercion argument. ". . . how can it be of importance to the main purpose of the trial how or by whom the fact that a witness is not to be relied on is made known? If he betrays the party who calls him and falsifies every statement which he makes, the opposite party will of course accept the treason, say nothing of impeachment and leave the jury no alternative but to find an unjust verdict upon evidence which both parties know to be the rankest perjury. . . . Nobody can profit by the rule but the witness and the antagonist of the party who calls him and they only by the defeat of the ends of justice." May, *Some Rules of Evidence* (1876) 11 AMER. LAW REV. 267.

[26]See *supra*, note 25.

Upon analysis, then, the reasons advanced for the rule against impeaching one's own witness are half-truths. Why then has the rule continued? The inevitable conclusion is that the common law rule is the veriform appendix of the law, which should be cut from the general body of evidence. It remains to be seen what, if any, attempts have been made to remove it from the law of New York.

History of Attacks upon the Impeachment Rule in New York

The first decision in New York to state that a party cannot impeach his own witness was *Lawrence v. Barker*.[27] There the trial court had refused to let the defendant contradict the testimony of one of his own witnesses by proof of prior inconsistent statements. The Supreme Court affirmed, stating in broadest terms that a party cannot impeach his own witness by evidence of bad character or of prior inconsistent statements.[28] The court was willing to allow the defendant to prove the facts by other witnesses and thus show that the first witness' account was incorrect; but it was not willing to let a witness be contradicted by his own prior inconsistent statements.

The rule so dogmatically announced was far from settled. In *People v. Safford*,[29] seventeen years later, the court, in repudiating a similar attempt by the district attorney to impeach his own witness by evidence of prior inconsistent statements before the grand jury, admitted that the authorities were in irreconcilable conflict and that the question could not be decided on direct authority.[30] Casting about for a principle on which to exclude the evidence, the court reasoned that since "the law denies a party the right to impeach his own witness by evidence of bad character, the party should not be allowed to give evidence of any sort for the sole purpose of impeaching his own witness."[31]

It was against the background of these two cases—each arriving independently of the other[32] at the conclusion that a party should not be allowed to impeach his own witness—that the first attack on the impeachment rule was made.

In 1849, David Dudley Field sought to incorporate into his Code of Civil Procedure two sections designed to change the impeachment rule. This proposal found in Sections 1845 and 1847, Part 4 of the Code relating to Evidence, read as follows:

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[27] 5 Wend. 301 (N. Y. 1830).

[28] 5 Wend. 301, 305 (N. Y. 1830).

[29] 5 Denio 112 (N. Y. 1847).

[30] It is interesting to note that the court in *People v. Safford* can find no case authority on the problem in New York. *Lawrence v. Barker, supra* note 27, is not cited; instead, the court reasons the case out on principle and arrives at a perfect statement of the absolute common law rule prohibiting impeachment of one's own witness.

[31] 5 Denio 112, 118 (N. Y. 1847). The problem raised by *People v. Safford* has been remedied in New York by § 266 of the Code of Criminal Procedure, *infra* note 41. Today if testimony by a witness is inconsistent with that given by him before the grand jury, any court can require a grand juror to disclose what the witness said in that prior proceeding. See generally Ward Baking Co. v. Western Union Tel. Co., 205 App. Div. 723, 200 N. Y. Supp. 865 (3d Dep't 1923).

[32] See *supra*, note 30.

"§ 1845. The party producing a witness, is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times, statements inconsistent with his present testimony, as provided in § 1848.

"§ 1848. A witness may also be impeached, by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present; and he must be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness, before any question is put to him concerning them."

But the Field Code of Civil Procedure failed of adoption in New York, and the above change never took place. Though rejected by his native New York, these draft sections were influential in causing England to provide for a similar change of its rule of impeachment in the Common Law Procedure Act of 1854.[33]

Field's ill-fated attempt, however, made the New York courts aware of the irrational foundation of the common law rule. In *Sanchez v. The People* (1860),[34] when the question of the right of counsel to impeach his own witness next arose, we find the Court of Appeals splitting on the question. Two judges, Selden and Clerke, dissented on the ground that if a party can correct his own witnesses—even to the extent of contradicting them by other witnesses—he should be allowed to impeach his own witnesses or weaken their credibility by their own previous contradictory statements.[35] This initial attack on the common law rule paved the way for the inroad made upon it in the now famous case of *Bullard v. Pearsall* (1873).[36]

In that case, the plaintiff was suing to rescind for fraud the sale of an interest in a patent right. The plaintiff contended that the sale had been made in June, 1868. To prove this, the plaintiff called one Thompson, "but to the surprise of the plaintiff the witness testified that the conversation took place on the 24th of July." The date being material, the plaintiff was permitted to ask the witness whether he had not upon a prior examination sworn that the conversation took place in June. The witness admitted that he had, but stated that by consulting a memorandum he had found that he was mistaken, and that actually the conversation had taken place on the 24th of July. There was a further question to the witness about that matter which the court excluded. Plaintiff appealed from a judgment for the defendant, alleging that the trial court had erred in not permitting him to contradict his own witness.

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[33] 17 & 18 Vict. c. 125, § 22 (1854).

[34] 22 N. Y. 147 (1860).

[35] Clerke, J., dissenting states: ". . . I consider the interests of justice will be best promoted by allowing every party to correct the testimony of witnesses whether called by himself or not. I know of no principle more unjust and more inexpedient than to conclude a party by whatever his witness swears without giving him every opportunity of correcting the testimony if the witness should intentionally or unintentionally swear falsely."

[36] 53 N. Y. 230 (1873).

In affirming the trial court's judgment, Judge Rapallo stated:

"Where a witness disappoints the party calling him by testifying contrary to the expectations and wishes of such party, it is a conceded rule that the latter shall not, for the purpose of relieving himself from the effect of such evidence, be permitted to prove that the witness is a person of bad character and unworthy of belief. There is also a great weight of authority sustaining the position that under such circumstances the party calling the witness should not be allowed to prove that he has on other occasions made statements inconsistent with his testimony at the trial, when the sole object of such proof is to discredit the witness. But it is well established that the party calling the witness is not absolutely bound by his statements, and may show by other witnesses that they are erroneous. The further question has frequently arisen whether the party calling the witness should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations, inconsistent with his evidence. Upon this point there is considerable conflict in the authorities. We are of the opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. Proof of other witnesses that his statements are incorrect would have the same effect, yet the admissibility of such proof cannot be questioned. It is only evidence offered for the mere purpose of impeaching the credibility of the witness, which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. In case he should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses; but where the questions as to such statements are confined to the witness himself, we think they are admissible. As a matter of course, such previous unsworn statements are not evidence, and when the trial is before a jury that instruction should be given."[37]

[37] 53 N. Y. 230, 231 (1873). The *Bullard v. Pearsall* rule has been applied in a number of reported cases in New York. In Blum v. Munzesheimer, 66 Hun 633, 21 N. Y. Supp. 498 (Sup. Ct. 1892), plaintiff-seller sought to recover the purchase price of goods ordered by one Zuckerman for defendant-buyer. To prove the purchasing agency, plaintiff called defendants' brother who testified contrary to an affidavit in plaintiff's possession. Plaintiff's counsel thereupon called the witness' attention to the affidavit, and asked him "to make such explanation as full and detailed as possible with a view to eliciting correct answers and thus establishing the truth and to state in what respects if any you were mistaken in your testimony and if possible why you were mistaken?"

This right to refresh the witness' recollection of an apparently inconsistent statement was not new. It had been laid down in England in *Melhuish v. Collier*[38] and *Wright v. Beckett*,[39] and by 1854 had been codified in the statute 17 and 18 Victoria, Chapter 125, Section 22.[40]

Bullard v. Pearsall was a desirable departure from the general rule against impeachment. The first great wedge driven into the absolute common law prohibition, it opened the way for further attempts to broaden the rule.

The first of these was minor. In 1881, the legislature of New York enacted Section 266 of the Code of Criminal Procedure, which provides that a member of the grand jury may be required by the court to disclose the testimony given by a witness before the grand jury for the purpose of ascertaining whether such testimony is consistent with that given by the witness before the court.[41] Here for the first time direct impeachment by the court

Held: this was a proper mode of refreshing witness' memory. It was calculated to elicit the truth, explain the testimonial conflict and did not *necessarily impair* the witness' credibility.

In People v. Ricker, 51 Hun 643, 4 N. Y. Supp. 70 (Sup. Ct. 1889), the district attorney, prosecuting an indictment for burglary, put a witness for the People on the stand. When the witness testified contrary to what he had said before the grand jury, the district attorney introduced the grand jury record and asked him to explain the inconsistencies in his testimony. The witness testified that what he had said before the grand jury was untrue. *Held:* the questioning was competent within *Bullard v. Pearsall.* It explained the district attorney's surprise and tended only *indirectly* to impeach the witness.

See further People v. Kelley, 113 N. Y. 647, 651, 21 N. E. 122 (1889); Maloney v. Martin, 81 App. Div. 432, 80 N. Y. Supp. 763 (4th Dep't 1903). Whether a question is calculated to probe recollection, to draw out an explanation of inconsistency, to explain surprise, and only indirectly and not necessarily to impeach the witness' credibility is a difficult question of fact to decide or to review on appeal. It is impossible today to state with accuracy how far counsel may question under the refreshment rule. In fact, it is questionable whether *Bullard v. Pearsall* continues to be a method of impeachment allowed in New York. See *infra*, p. 388; see especially People v. Romano, 279 N. Y. 392, 18 N. E. (2d) 634 (1939).

[38] 15 Q. B. 878, 117 Eng. Rep. 690 (1850).

[39] 1 Moo. & Rob. 414, 174 Eng. Rep. 143 (1833).

[40] See *supra*, note 33. The rule announced in *Bullard v. Pearsall* has been adopted in many other jurisdictions. See Carpenter's Appeal, 74 Conn. 431, 51 Atl. 126 (1902); National Syrup Co. v. Carlson, 42 Ill. App. 178 (1891); Humble v. Shoemaker, 70 Iowa 223, 30 N. W. 492 (1886); Hall v. Chicago R. I. & P. Ry., 84 Iowa 311, 51 N. W. 150 (1892); Commonwealth v. Brown, 150 Mass. 330, 23 N. E. 49 (1889); State v. Tall, 43 Minn. 273, 45 N. W. 449 (1890); Creighton v. Modern Woodmen, 90 Mo. App. 378 (1901); State v. Draughn, 140 Mo. App. 263, 124 S. W. 20 (1910); George v. Triplett, 5 N. D. 50, 63 N. W. 891 (1895); Weygandt v. Bartle, 88 Ore. 310, 171 Pac. 587 (1918). For an excellent discussion of *Bullard v. Pearsall,* see Holtzoff, *The New York Rule as to Impeachment by a Party of His Own Witnesses* (1924) 24 COL. L. REV. 715. See also Putnam v. United States, 162 U. S. 687, 689, 16 Sup. Ct. 923 (1896), for an analysis of the impeachment by refreshment rule and whether it is a rule of refreshment or impeachment.

[41] § 266 of the Code of Criminal Procedure provides: "A member of the grand jury may, however, be required by any court, to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony, or upon his trial therefor." This section was derived in part from Revised Statutes of New York, pt. 4, c. 2, tit. 4, § 31 (1828).

through prior oral statements is sanctioned in New York. It is clear from the statute that it embraces a method of impeaching one's own witness. The right of the court to examine a grand juror is not made dependent on surprise; neither is it rationalized as a refreshment of recollection.[42]

The first real attack, however, came in the nineteen-thirties. For years lawyers, judges and bar associations had attacked the "illogic" of the rule prohibiting impeachment of one's own witness.[43] In 1934, the Commission on Administration of Justice in New York recommended to the legislature the enactment of a new section of the Civil Practice Act to provide:

> "The party who calls a witness shall not be precluded from impeaching him by proof of prior contradictory statements or by evidence of bias or corruption or in any other manner, except that the party calling the witness shall not be permitted to prove the bad reputation of the witness for truth and veracity or to prove that he was convicted of a crime unless such proof is offered prior to or at the beginning of the examination of the witness or unless the court is satisfied that such bad reputation or conviction was discovered by the party subsequent to the witness giving his testimony."[44]

The proposed statute was similar to the English law derived from the original Field Code.[45] But it was defeated in the 1934 and 1935 legislatures because the legislators feared the proposal violated the hearsay evidence rule —that a jury might use the admissible impeaching testimony as substantive proof.[46]

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[42]See *supra,* note 41. It is interesting to note that under § 266 of the Code of Civil Procedure, the prior inconsistent statements of the witness to the grand jury can be shown either (1) by reading from the *stenographic notes* or (2) by the testimony of one of the members of the jury, but not by the *testimony* of the grand jury stenographer. People v. Goodheim, 188 App. Div. 148, 176 N. Y. Supp. 468 (1st Dep't 1919).

[43]See *supra,* note 4. For additional attacks upon the rule prohibiting impeachment of one's own witness, see Witnesses, Report of the Crime Commision of New York State, Legislative Document 94 (1927) 70; Report of the Committee on Law Reform, Reports of the Association of the Bar of the City of New York (1930) 235.

[44]Recommended Changes in Practice, Procedure and Evidence, Report of the Commission on the Administration of Justice in New York State, Legislative Document 92 (1934) § 38. This same recommendation of the Commission was reintroduced into the 1935 legislature. Legislative Recommendations, First Supplemental Report of the Commission on the Administration of Justice in New York State, Legislative Document 71 (1935) 10.

[45]See *supra* p. 382. The English Act, 15 & 16 Vict. c. 125, § 22 (1854) provides: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony."

[46]Report of the Committee on Law Reform, Reports of the Association of the Bar of the City of New York (1936) 196; see also Greene, *1935 Legislative Program Results* (1935) 13 THE PANEL 3, 7. This fear was best expressed in the New York County Lawyers' Report prepared by Louis Fabricant, where it was stated: "Under this proposed statute, the prior inconsistent statements of the witness called by a party could be shown even if they were not under oath and not in writing. Thus a party disappointed with the testimony of a witness could bring in some person to testify that in a conversation with the witness, the witness had told a different story. Such different story would thus get before the jury and the witness' present testimony under oath

In 1936, the issue was again presented to the legislature—this time by the newly-created Judicial Council.[47] Because of the rough treatment which the Commission's proposal had received at the hands of both the New York County Lawyers' Association and the State Legislature,[47a] the new recommendations were quite mild. "In addition to the manner of impeachment already allowed by law," the Council recommended impeachment by means of prior statements *if made in writing or under oath.*[48]

The Council refused to allow *oral* inconsistent statements to be admitted. Such would afford "too much leeway in impeachment and might well be used as a means of coercion."[49] The prohibition against introducing evidence of the bad reputation for veracity of one's own witness remained absolute.

The statute was adopted in substantially the form recommended, and with a minor alteration[50] continues to be the final statement of the rule against impeachment in New York.

Impeachment in New York Under § 343a of the Civil Practice Act and § 8a of the Code of Criminal Procedure

The statutory changes of 1936 seemed to end New York's impeachment troubles. A New York lawyer could put his witness on the stand, and if the witness surprised him, he was allowed to refresh the witness' recollection of prior inconsistent statements;[51] or if he had a prior inconsistent statement in writing or under oath, he could prove that writing by other witnesses.[52] He could also apply to the court to have it call up a grand juror to testify as to prior inconsistent statements made by his witness in that hearing.[53]

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would be impeached by someone depending solely on his recollection of a conversation previously had with the witness. Casual utterances of the witness could be distorted and the distortions offered by the party who calls the witness for the purpose of impeaching him. . . . It does not seem wise to allow the impeachment process to make use of conflicting, extra-judicial, unauthorized oral statements." Report of the Committee on Criminal Courts, New York County Lawyers' Ass'n, Report 68 (1936).

[47]Recommendations to Permit Contradiction of One's Own Witness, Report of the Judicial Council of New York State, Legislative Document 48 (1936) 179.

[47a]See *supra,* note 46.

[48]The Council recommended the following amendment to both § 343 of the C.P.A. and § 8 of the C.C.P.: "In addition to impeachment in the manner now permitted by law, any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or in any action or special proceeding or upon any hearing or inquiry or in any testimony, declaration, deposition, certificate or affidavit."

[49]See *supra,* note 47.

[50]In 1937, the legislature deleted "in any action or special proceeding or upon any hearing or inquiry or in any testimony, declaration, deposition, certificate or affidavit" and substituted therefore "or was made under oath." It was feared that the word "declaration" contained in the last phrase of § 343a of the C.P.A. and § 8a of the C.C.P. might be interpreted to include any prior oral statement—a result which neither the legislature nor the Judicial Council intended. The statute as amended thus allows impeachment of one's own witness by proof that such witness made prior contradictory statements either *in writing* or *under oath.* See Reports of the Committee on State Legislation, New York County Lawyers' Association, Report 144 (1937) 337.

[51]Bullard v. Pearsall, 53 N. Y. 230 (1873), *supra* note 37.

[52]§ 343a of the C.P.A. and § 8a of the C.C.P., *supra* notes 48, 50.

[53]§ 266 of the C.C.P., *supra* note 41.

New York seemed well on the way toward the abolition of the common law rule. However, two recent decisions by the Court of Appeals have given a rude shock to those who hope for complete impeachment in New York.

In *People v. Romano*,[54] the Court of Appeals raised doubts as to whether the *Bullard v. Pearsall* refreshment rule continues to be a method of impeachment in New York. In the *Romano* case, one Frances Granziano was raped by a group of men. She sought to convict Romano (one of the defendants) by her own testimony corroborated by that of Asaro (another defendant). In a pre-trial examination, Asaro was brought from Elmira State Reformatory and questioned by the district attorney. A stenographic report was made of the examination but it was never signed by the witness. In this grilling, Asaro orally admitted to the district attorney that Romano was present when the rape occurred; but when put on the stand at the trial, he denied knowledge of Romano's presence.[54a] The district attorney, surprised at the hostility of his witness, sought to question him as to his prior inconsistent statements by way of refreshing his recollection.[55] Some statements Asaro denied making; others he admitted in part, explaining their inconsistency. The Court of Appeals disapproved of the attempt at impeachment. "No inconsistent prior utterance of the co-defendant was admissible unless it had been sworn to or subscribed by him."[56] The court makes no mention of the *Bullard v. Pearsall* rule, but its positive statement of Section

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[54]279 N. Y. 392, 18 N. E. (2d) 634 (1939).

[54a]The problem which the *Romano* case raised was foreseen by Mr. Sol Boneparth in his statements before the Governor's Conference on Crime. In commenting on the newly proposed impeachment statute (§ 8a of the Code of Criminal Procedure) he stated: "In the section as it is now framed impeachment is permitted where the district attorney is in possession of either sworn statements or statements signed by the witness sought to be impeached. . . . In my experience [as assistant district attorney, Bronx County] statements which are taken from witnesses in advance of the trial are, in most cases, not in writing and not signed. [They are taken by a stenographer.] We don't ask the witness to wait until the statement is written out because if we do ask him to wait and sign it, the witness may between the time he has given the statement and the time that it is written out, upon reflection, refuse to sign it or hesitate to sign it. . . .

"You have a stenographic statement or in the case of an arrest by a policeman upon the complaint of a victim who identifies the defendant to the policeman, while you will never get anything written from the witness you have that statement wherein he accused the arrested man and identified him to the policeman, and it seems to me that should be just as effective in impeaching a witness as a statement which he has signed on sober reflection. In that respect I would suggest an amendment to the proposed section."

It is interesting to note that if Mr. Boneparth's suggestion that unsigned stenographic notes be admissible as impeaching evidence had been adopted by the legislature, the problem of the *Romano* case would never have arisen; for, there, such notes existed, but they had never been signed by Asaro and were, therefore, inadmissible under § 8a of the Code of Criminal Procedure. Both Mr. Felix Benvenga (assistant district attorney, New York County) and Mr. Philip Halperin (University of Buffalo Law School) concurred in Mr. Boneparth's suggestion that the statute allow impeachment through any prior inconsistent statement, whether *oral* or *written*. Prosecution and the Courts, Proceedings of the Governor's Conference on Crime, the Criminal and Society (1935) 733-741.

[55]Bullard v. Pearsall, 53 N. Y. 230 (1873), *supra* note 37.

[56]279 N. Y. 392, 394, 18 N. E. (2d) 634 (1939).

8a of the Code of Criminal Procedure seems to leave no doubt as to the basis of its ruling.

There are three possible interpretations of the court's decision. First, the court refused to allow the attempt at refreshment despite *Bullard v. Pearsall.* The new statute, the court suggests, is the exclusive method of impeachment in New York, replacing all other modes.[57] Second, the court may have found that the attempt to refresh Asaro's mind was proper; but in answering the refreshing questions, the witness denied the prior inconsistent statements and thereby prevented further proof of them through other witnesses.[58] Under this view, the question of Asaro's credibility was properly raised for the jury to consider; but if the jury, in discrediting his testimony on the stand, recognized the prior statements made to the district attorney, it must also recognize that Asaro was an accomplice at law;[59] and his testimony as an accomplice was not sufficient to convict Romano as the rapist within Section 399 of the Code of Criminal Procedure.[60]

Finally, the court may have found the attempted impeachment of Asaro valid and successful. If this view is correct, the jury should have viewed Asaro's testimony as neutralized by the impeachment.[61] Since Asaro's was the only testimony which linked Romano with the crime, with the failure of his testimony as affirmative evidence went the failure of proof of a material element of the indictment.[62]

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[57]The court's opinion intimates that the district attorney's questioning as to Asaro's prior inconsistent statement went beyond the impeachment statute because such statement was neither in writing nor under oath. *Supra,* notes 48, 50. This conclusion is reached despite the fact that the statute's express preamble, "In addition to impeachment in the manner now permitted by law," was intended to preserve the *Bullard v. Pearsall* rule—the right of counsel to impeach his own witness by way of refreshment. See Report of the Committee on State Legislation, New York County Lawyers' Ass'n, Report 17 (1936) 191: "The new statute will not change the rule that one's own witness may be reminded of an inconsistent oral statement, not under oath, for the purpose of refreshing his recollection, although not for the purpose of impeachment. People v. Purtell, 243 N. Y. 273, 280."

[58]It is a well settled corollary to the *Bullard v. Pearsall* refreshment rule that if the witness denies having made the prior inconsistent statements, such statements cannot be proved by other witnesses. See People v. Purtell, 243 N. Y. 273, 153 N. E. 72 (1926); 2 FORD, LAW OF EVIDENCE (1935) § 131. The value of the right to refresh lies in the impeaching force of the *question,* containing the prior inconsistent statement, rather than in any answer that may be given by the witness. See generally, Holtzoff, *The New York Rule as to Impeachment by a Party of His Own Witnesses* (1924) 24 COL. L. REV. 715.

[59]The tenor of the prior contradictory statements, if admitted, was not only to place Romano at the scene of the crime, but also to establish Asaro's status as an accomplice within § 399 of the Code of Criminal Procedure. See People v. Romano, 279 N. Y. 392, 394, 18 N. E. (2d) 634 (1939).

[60]Though Asaro's prior statements did identify Romano as the rapist, they alone were not sufficient to convict because testimony of an accomplice must be corroborated before a conviction may be had thereon; and there was no "other evidence" tending to identify Romano as the rapist, within the requirements of § 399 of the Code of Criminal Procedure. People v. Kress, 284 N. Y. 452, 31 N. E. (2d) 898 (1940); People v. Nitzberg, 287 N. Y. 210, 38 N. E. (2d) 490 (1941).

[61]See generally 3 WIGMORE, EVIDENCE (3d ed. 1940) § 1018. See also Charlton v. Unis, 4 Gratt 60 (Va. 1847); Gould v. Norfolk Lead. Co., 9 Cush. 346 (Mass. 1855); Roge v. Valentine, 280 N. Y. 268, 20 N. E. (2d) 751 (1939); Simon v. Lowenthal, 169 Misc. 718. 8 N. Y. S. (2d) 484 (1939).

[62]§ 2013 of the Penal Code reads: "No conviction can be had for rape or defilement

Whichever of these three views of the *Romano* case is adopted, one conclusion is certain: whether *Bullard v. Pearsall* continues to be the law of New York is doubtful. Under the first interpretation of the *Romano* decision, Sections 343a of the C. P. A. and 8a of the C. C. P. became law at the sacrifice of that other long-recognized method of impeachment—that of refreshment of recollection.[63]

This conclusion from the *Romano* case was strengthened two years later by *Jenkins v. 313-321 West 37th St. Corp.*,[64] where the Court of Appeals, applying Section 343a of the C. P. A., stated:

> "The recent statute is in derogation of the common law and must be strictly construed. Such construction does not admit of the use of other than signed statements or statements under oath to impeach one's own witness in New York."[65]

This marks the end of the story to date. The deepest inroad that has been made on a rule universally condemned by all authorities is that one's own witness can be impeached only by a prior inconsistent statement and then only when *in writing* or *under oath*. The present New York statute has not inspired a crusade against the old rule. The courts have failed to broaden the statutory mandate. Any legislative attempt at piecemeal reform seems doomed to strict construction by the courts. The time has come for the legislature to strike a complete blow against the ancient talisman.

Full and Complete Impeachment: A Plea

The failure of New York's attempts to change the common law rule prohibiting impeachment is largely due to a failure to see that the ancient doctrine announced in the early days of compurgation[66] does not fit the actual facts presented by the modern jury trial. There is a vital distinction between "oath helpers" and witnesses in the modern sense. Today, except in the case of character witnesses and expert testimony, parties under the adversary system do not choose any person they may like to place upon the witness stand, but are forced to take those, good and bad, who by chance happen to have heard or observed facts which pertain to the cause on trial.[67] In many cases—especially negligence actions, which constitute seventy-five percent of the trial litigation in the courts today[68]—the witnesses are personally

upon the testimony of the female defiled, unsupported by other evidence." Under this section it has been held that there must be other proof, not only of the *existence* of the crime, but of the *defendant's perpetration* thereof. See People v. Shaw, 158 App. Div. 146, 142 N. Y. Supp. 782 (3d Dep't 1913); People v. Downs, 236 N. Y. 306, 140 N. E. 706 (1923).

[63]See *supra*, note 57.

[64]284 N. Y. 397, 31 N. E. (2d) 503 (1940).

[65]284 N. Y. 397, 403, 31 N. E. (2d) 503 (1940).

[66]See *supra*, note 7.

[67]Selover v. Bryant, 54 Minn. 434, 56 N. W. 58 (1893); see May, *Some Rules of Evidence* (1876) 11 Amer. Law Rev. 264; Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. of Chi. L. Rev. 69, 77.

[68]Recommendations to Permit Contradiction of One's Own Witness, Reports of the Judicial Council of New York State, Legislative Document 48 (1936) 181.

unknown to the litigants. It is not only unreal but unfair to force a party to be bound by the statements of his so-called "own witness" when he knows the witness is lying. Any prohibition against impeaching one's own witness is under modern conditions a real hindrance to the ascertainment of truth.

Courts have long recognized this unreality in the common law rule. Early in the history of the prohibition it was recognized that a party did not so far guarantee the credibility of his witness as to be precluded from contradicting him by putting other witnesses on the stand to testify to their version of the facts.[69] The courts rationalized this by stating that the privilege was one of *contradiction,* not *impeachment.*[70] The contradiction theory, however, was realistic. Witnesses may err. When they do, counsel can prove the truth through others, refuting the honest but erroneous version of his own prior witness.

Examples of how the general prohibition operates disclose its provincialism. Nowhere in the field of evidence is a more ludicrous result reached than in the case where one party calls his adversary as a witness. The courts still hold that the producing party guarantees his adversary's credibility and cannot impeach him generally.[71] Yet it is well settled that proof of any prior inconsistent statement by the adversary is competent as an admission, but not by way of impeachment.[72]

These illustrations of the operation of the common law rule show where any effective change must start. Any amendment must recognize that today a party cannot choose his witnesses. He cannot predict what their testimony will be. Any theory based on guarantees and vouchings is unreal. Parties should be given the right to impeach *any* witness *fully and completely.*

The new statute should provide for impeachment by a party of his own witness in the same manner and to the same extent as impeachment of an opposing witness is now allowed by law.[73] A party should be allowed to impeach his own witness (1) by prior inconsistent statements whether oral or under oath, (2) by evidence of bad character, (3) by proof of interest, bias, or corruption.

1. *Impeachment by inconsistent statements.*—The new statute should allow impeachment of one's own witness by prior inconsistent statements whether

[69]See *supra,* notes 16, 20.

[70]See generally 3 WIGMORE, EVIDENCE (3d ed. 1940) § 907. See also Lawrence v. Barker, 5 Wend. 301, 305 (N. Y. 1830); Pollack v. Pollack, 71 N. Y. 137, 152 (1887); De Meli v. De Meli, 120 N. Y. 485, 490, 24 N. E. 996 (1890).

[71]See generally 3 WIGMORE, EVIDENCE (3d ed. 1940) § 916 and cases cited therein. In New York the common law rule has been relaxed somewhat by § 343 of the Civil Practice Act which provides: "The testimony of a party taken at the instance of the adverse party orally or by deposition may be rebutted [contradicted] by other evidence." See generally Crouse v. Frothingham, 27 Hun 123 (N. Y. 1882), *rev'd,* 97 N. Y. 105 (1884); Engel v. Dicter, 31 Misc. 793, 65 N. Y. Supp. 296 (Sup. Ct. 1900). Under the Federal Rules of Civil Procedure, however, a party cannot only contradict, but also impeach an adverse party of his own calling. Rule 43 (b) of the Federal Rules of Civil Procedure, *infra* note 79. See generally MOORE, FEDERAL PRACTICE (1938) § 43.03.

[72]Engel v. Dicter, *supra* note 71. For an interesting sidelight on the general impeachment problem, see Prince, *Admissibility of Contradictory Statements to Impeach Unavailable Witness; New York Rule* (1940) 10 BROOKLYN L. REV. 133.

[73]See *supra,* note 24.

oral or written, whether under oath or not. This suggestion is not without precedent. Massachusetts already has a similar statute,[74] which represents the legislation in ten states.[75] Other jurisdictions allow the privilege of impeachment through any prior inconsistent statement provided that the witness prove adverse in the opinion of the court,[76] or provided that the party producing him is surprised,[77] "entrapped,"[78] or misled.[79]

[74]Mass. Genl. Law (1932) c. 233, §§ 22, 23.

[75]ARK. DIG. STAT. (Pope, 1937) § 5196; CAL. CODE CIVIL PROC. (Deering, 1937) § 2049; IDAHO CODE ANN. (1932) c. 16 § 1207; IND. STAT. ANN. (Burns, 1933) c. 2 § 1926; KY. CODES ANN. (Carrols, 1932) Civ. Prac. § 596; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 10666; ORE. CODE ANN. (1930) c. 9 §1909; TEX. ANN. CODE CRIM. PROC. (Vernon, 1941) § 732; WYO. REV. STAT. ANN. (Courtright, 1931) c. 89 § 1706. Furthermore, Tentative Draft No. 2 of the American Law Institute's Restatement of Evidence allows a party calling a witness to impeach him by a prior oral contradictory statement, not under oath, but gives the judge a discretionary right to exclude such evidence unless the witness was so examined while testifying, as to give him an opportunity to deny or explain the statement.

Tentative Rule 106 on Impeachment reads as follows (italics added):

"(1) Subject to Paragraph (2) and (3) of this Rule, for the purpose of impairing or supporting the credibility of a witness, any party *including the party calling him* may (a) examine him concerning any conduct by him and any other matter of substantial probative value upon the issue of this credibility as a witness, without being required, in examining him as to a *statement* made by him *in writing inconsistent* with any part of his testimony, to show or read to him any part of the writing; and (b) introduce other evidence of his conduct or of other matter having such substantial probative value, except that evidence of traits of his character, other than honesty or veracity or of his commission or conviction of a crime not involving dishonesty or false statement shall be inadmissible.

"(2) The judge *in his discretion* may exclude evidence of a *written or oral statement* of the witness offered under Paragraph (1) (b) of this Rule unless the witness was so examined while testifying as to give him an opportunity to deny or explain the statement.

"(3) For the purpose of impairing the credibility of an accused in a criminal action who testifies at the trial therein, the accused shall not at that trial be examined, nor shall any evidence be admitted, as to facts tending to prove his commission or conviction of another crime, unless he has first introduced evidence of his good character to support his credibility." *Cf.* RESTATEMENT, EVIDENCE (Tent. Draft No. 1, April 18, 1940) Rules 122, 123, 124, and comments thereto.

[76]FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 4377; N. M. STAT. ANN. (Courtright, 1929) c. 45 § 607; VT. PUB. LAWS (1933) § 1702; VA. CODE (Michie, 1930) § 6215; HAWAII REV. LAWS (1935) § 3835.

[77]LA. CODE CRIM. PROC. ANN. (Dart, 1932) §§ 487, 488; D. C. CODE (1929) Tit. 9, § 21.

[78]GA. CODE (1933) § 5879.

[79]Phillipine Islands, Code Civil Proc. (1901) § 340. It is interesting to note that the Federal Rules of Civil Procedure continue the prohibition that a party cannot impeach his own witness, subject however to the following exceptions: (1) If the witness is an adverse party (or an officer, etc. thereof) he may be impeached, and (2) Rule 26 (d) (1) provides that "any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness."

Rule 43 (b) reads: "Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

The original draft (April, 1937) of this rule, as amended by the final report, read:

The admission of prior oral statements would not violate the hearsay rule as commonly feared,[80] for they are not offered as substantive evidence to prove what the actual facts at issue were. They would merely show that the hostile witness had on a prior occasion told a totally different story, and that, therefore, his credibility is questionable. The impeaching statements would neutralize the record testimony, and would not be substituted for the witness' original statements.

Finally admission of prior inconsistent statements need not result in the jury's considering unsworn impeaching testimony as substantive evidence on the issues of the case. This danger, common to all types of impeachment,[81] can be successfully guarded against by the trial judge's charge to the jury[82]

2. Impeachment by bad character.—Most statutes which allow impeachment by evidence of prior inconsistent statements expressly disallow character impeachment.[83] The reason for this is partly historical. Almost all the legislation on impeachment is the product of a "tendency to copy first proposals rather than make an independent investigation of the merits of the rule."[84] The numerous states which have followed the Field proposal refuse to allow character impeachment simply because it was frowned on by the early codifiers.[85]

The objection most commonly made to character impeachment is that it would tend to coerce the witness.[86] This fear was best stated in *People v. Minsky*:[87]

> "A party should not be permitted after having unsuccessfully taken a chance to secure favorable testimony to attack his own witness. The power to coerce a witness may as reasonably be expected to beget a lie as to force the truth from unwilling lips."

". . . A party may show that any witness, whether called by him or by an adverse party, has previously made, under oath or otherwise, statements contradictory to his testimony without having first called them to his attention." The Supreme Court, however, struck this passage from the rule as finally enacted because it feared that such provision would "abridge, enlarge or modify the substantive rights of litigants"—a result which the rule-makers had no jurisdiction to effect and one which the enabling act expressly prohibited. See 48 STAT. 1064 (1934), 28 U. S. C. § 723b (1934).

This failure of the Federal Rules to allow complete impeachment through prior oral inconsistent statements has been widely criticized. See MOORE, FEDERAL PRACTICE (1938) § 43.04; Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure, Part 2* (1937) 47 YALE L. J. 194, 201.

[80]See WIGMORE, EVIDENCE (3d ed. 1940) § 1018. State v. Mulholland, 16 La. Ann. 377 1861); State v. Johnson, 12 Munn. 488 (1867); Dixon v. Walker, 206 App. Div. 565, 202 N. Y. Supp. 283 (3d Dep't 1923). For a good general discussion of impeachment through prior inconsistent statements and the hearsay evidence rule, see Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1921).

[81]Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69, 87.

[82]See *supra*, note 80. See especially Crago v. State, 28 Wyo. 215, 225, 202 Pac. 1099 (1921), and cases cited therein.

[83]See *supra*, notes 74, 75 ff.

[84]Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69, 91.

[85] See § 1845, Part 4 of Field's Draft Code of Evidence, *supra* p. 382.

[86]For a general discussion of the protection-against-coercion rationale, see *supra*, p. 380. See also Cox v. Eayres, 55 Vt. 24, 27 (1883).

[87]227 N. Y. 94, 99, 124 N. E. 126 (1919).

This argument fails to take into account two factors which should make character evidence admissible: (a) The rule against character impeachment is not designed to protect the witness, because the witness is always open to "character assassination" by the defendant. The defendant's right to deprecate the witness' reputation for truth and veracity is just as coercive an influence on the witness' testimony as plaintiff's potential right so to impeach might be. (b) Moreover, if only the defendant is allowed to impeach by evidence of bad character, he can impeach a witness telling the truth against his interests, and refrain from exercising the same power in the case of plaintiff's hostile witness who is improving his case. Limiting the right of impeachment to one party gives that party an unfair advantage in the receipt of testimony.[88]

Finally, the protection-against-coercion rationale assumes that plaintiff's counsel is dishonest, ready to force a recalcitrant witness to lie under a threat of character impeachment. This is highly improbable, for the dishonest attorney could never be sure that fear of impeachment would cause his witness to falsify in his favor. The threat of perjury would have a more forceful countervailing influence on the witness' telling the truth.[89] Also, few attorneys would dare incur the suspicion of the jury by constantly putting their witnesses on the stand only to discredit them and leave no substantive testimony.[90]

3. *Impeachment by interest, bias, or corruption.*—The proposed statute advocates impeachment of one's own witness by evidence of interest, bias, or corruption for the same reasons impeachment by evidence of bad character is favored. The possibility that such a privilege may be used as a club to force false testimony is less to be feared than the injustice of allowing corrupted witnesses, free from attack, to prejudice the party's case.

CONCLUSION

Complete abrogation of the common law rule seems the only course open. Any attempt merely to modify the rule fails in that it must accept the basic premises of the common law argument—the premises of guarantee and coercion. These reasons for the rule have long since ceased to exist. Today, witnesses are not the property of either party. They are necessary to the litigation. They are really the property of the court and the issues involved, and no rule should assign them to one party or the other.

The courts have long shown their dislike for the rule.[91] Its history in New York has been a "gradual process of legislative and judicial distinction

[88]See *supra*, p. 380.

[89]Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69, 82, 83.

[90]Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69, 96: "Excessive use of [a complete right of] impeachment would be checkmated by its own dangers. . . . The ostensible impropriety of a party in calling a witness and impeaching him if he testified against him, would naturally cause attorneys to be hesitant in using this method of impeachment. If counsel abused the privilege of using character testimony, he would pay the price with the jury, who might resent too much of such procedure."

[91]See *supra*, note 4.

and qualification which is a characteristic of the existence of an unwise rule of law."[92] The time has come for the New York legislature to do what its predecessor of 1849 feared to do. Rip down the common law prohibition, and set up in its place a rule allowing complete impeachment of one's own witness—a rule of reason, reality, and justice.

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[92]Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69, 96.

*The author gratefully acknowledges the assistance of Professor Arthur John Keeffe, Cornell Law School, under whose supervision and guidance this article was written.